

Application Serial No. 10/631,025
Attorney Docket No. 60215.0004USU1
Amendment & Response

REMARKS

This Amendment is in response to the Office Action dated July 27, 2005. Claims 1-27 were examined in the Office Action. Claims 1-27 were rejected. Examination and reconsideration based on this Amendment and the following remarks are respectfully requested.

Claim Rejections - 35 U.S.C. § 103

Claims 1-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cao et al., U.S. Patent No. 5,922,664, (hereinafter *Cao*).

Claims 1 and 26

Specifically, with respect to claims 1 and 26, the Examiner states that:

Cao et al disclose a pourable detergent concentrate, which may maintain or increase in viscosity after dilution. Cao et al further teach that said concentrates has a dilution level in the range from about 0.5 to about 5 volumes of water (col. 3, lines 55-57). Furthermore, said concentrate comprises surfactants such as anionic sulfates, alkyl benzene sulfonates and alkyl ether sulfates; nonionic surfactants; amphoteric surfactants such as betaines; and cationic surfactants (col. 4, line 6-col.5, line 45). Moreover, Cao et al further teach the inclusion of viscosity modifiers such as electrolytes and in particular alkali or alkaline metal chlorides (col. 6, lines 42-45). With respect to the use of said concentrates, Cao et al teach that said concentrates are used as detergents, shampoos, body douche and body lotions (col. 6, lines 61-64). Furthermore, adjunct ingredients are also incorporated such as dyes, perfumes, bactericides, fungicides, preservatives and skin conditioners (col. 7, lines 1-5).

Cao et al disclose all of the instantly required except a specific teaching with respect to the ratios of suspension matrix to water.

It would have been obvious to one of ordinary skill in the art to combine the suspension matrix and water in the ratios as claimed given that Cao et al encompasses the dilution volume as claimed and generally teaches the final water volume of the compositions. Therefore, one of ordinary skill in the art with a reasonable expectation of success would have been motivated to combine the suspension matrix and water in the ratios as claimed, absent a showing to the contrary.

Applicant respectfully suggests that the Examiner has failed to make a *prima facie* case of obviousness. In order to make a *prima facie* case of obviousness, the Examiner

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must set forth references, which teach or suggest every claim limitation (MPEP §2143). There is nothing in the reference cited by the Examiner that discloses "teaching with respect to the ratios of suspension matrix to water" as recited by claims 1 and 26. Furthermore, Examiner admits that the references do not disclose "teaching with respect to the ratios of suspension matrix to water" (Office Action page 3 lines 5-6).

Examiner also states:

It would have been obvious to one of ordinary skill in the art to combine the suspension matrix and water in the ratios as claimed given that Cao et al encompasses the dilution volume as claimed and generally teaches the final water volume of the compositions." (Office Action page 3 lines 7-10).

Per the Office Action's admission, Cao provides only a general teaching and therefore an 'obvious to try' rationale is being implemented. 'Obvious to try' rationale in support of an obviousness rejection is improper. MPEP §2145(X)(B) states:

The admonition that 'obvious to try' is not the standard under §103 has been directed mainly at two kinds of error. ... In others, what was 'obvious to try' was to explore a new technology or general approach that seemed to be a promising field of experimentation, where the prior art gave only general guidance as to the particular for of the claimed invention or how to achieve it. (Emphasis Added)

The courts have held that: "[a]n 'obvious-to-try' situation exists when a general disclosure may pique the scientist's curiosity, ...but the disclosure itself does not contain a sufficient teaching of how to obtain the desired result, or that the claimed result would be obtained if certain directions were pursued." (Emphasis Added) *In re Eli Lilly & Co.* 902 F.2d 943, 14 U.S.P.Q.2d 1741 (Fed. Cir. 1990). Accordingly, independent claims 1 and 26 patentably distinguish the present invention over the cited reference, and Applicant respectfully requests withdrawal of the rejection of claims 1 and 26.

If the Examiner continues to rely on this unsupported contention, Applicants respectfully request the Examiner to provide support. See *In re Zurko*, 258 F.3d 1379, 59 U.S.P.Q.2d 1693 (Fed. Cir. 2001) holding that the USPTO must point to some concrete evidence in the record to support core factual findings in a determination of patentability; Memorandum by Stephen G. Kunin, Deputy Commissioner for Patent Examination

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Policy (February 21, 2002) stating that it is never appropriate to rely on common knowledge without evidentiary support as sole or principal evidence on which to base rejection; 37 C.F.R. §1.104 providing that when a rejection in an application is based on facts within the personal knowledge of an Examiner, the data should be stated as specifically as possible, *and the facts must be supported*, when called for by the applicant, by an affidavit from the Examiner; MPEP §2144.03 providing that the Examiner may only take official notice of facts outside of the record which are capable of instant and unquestionable demonstration as being "well-known" in the art and, if the Applicant traverses such an assertion, the Examiner *should cite a reference* in support of his or her position.

Applicant further submits that one of ordinary skill in the art would not have been motivated to modify Cao to produce claims 1 and 26. Cao discloses a micellar dispersion of a mixture of at least two surfactants having differing resistance to electrolytic salting out. This teaches away from claims 1 and 26 reciting at least one surfactant. (See Cao column 2, lines 15-25).

Dependent Claims 2-25, and 27

Regarding claims 2-25, and 27, Applicant submits that these claims are in condition for allowance by virtue of their dependency on amended claims 1 and 26. MPEP §2143.03 citing *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Accordingly, Applicant respectfully request withdrawal of the rejection to claims 2-25, and 27. Regarding the Examiner's additional assertions, which have not been addressed specifically, Applicant respectfully submits that these arguments are moot in view of the above comments and the amendment to the claims. Accordingly, in view of the above arguments, Applicant respectfully submits that claims 2-25, and 27, are in condition for allowance.

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CONCLUSION

Applicant respectfully requests that this Amendment After Final be entered by the Examiner, thereby placing the claims in condition for allowance. Applicant respectfully submits that the proposed amendments of the claims do not raise new issues or necessitate the undertaking of any additional search of the art by the Examiner. Furthermore, Applicant respectfully submits that the entry of the Amendment would place the application in better form for appeal, should the Examiner dispute the patentability of the pending claims. Therefore, this Amendment should allow for immediate action by the Examiner. Accordingly, the Examiner is respectfully requested to pass this application to issue.

Respectfully submitted,

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